VIRGINIA LAW REGISTER

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The Minnesota Case.

Not since the case of Chisholm *v.* Georgia has the Supreme Court of the United States decided a case whose effect seems to us more far reaching, and to use one of Justice Harlan's expressions, "attended by more pernicious results" than Ex parte Edward T. Young, decided March 23d, 1908. Unlike most of the constitutional questions decided by the Supreme Court, there is but one dissenting Judge, Mr. Justice Harlan, delivering a dissenting opinion, upon which we comment later. The case in brief was this:

Perkins and Shepherd, shareholders in the Northern Pacific Railway Company, citizens of Iowa and Minnesota, brought suit in the Federal Court in Minnesota against the railroad company, Edward T. Young, Attorney General of Minnesota and the several members of the State Railroad and Warehouse Commission and certain jobbers of freight over the lines of the railroad. Their bill *inter alia* alleged that the orders of the railroad commission reducing tariffs and charges which the railroads had theretofore been permitted to make, were unjust, unreasonable and confiscatory, and if enforced would take the property of these gentlemen and the railway company without due process of law and in violation of the Constitution of the United States. They also averred that they had asked the president and directors of the company to disobey the orders of the commission and to institute suits to declare them void, but said president, etc., declined for fear of subjecting themselves to severe penalties, which included confiscation of property, long terms in jails and penitentiaries, etc., etc. They also averred that Young, the Attorney General, was about to proceed to enforce the orders of the commission and directed an injunction against him. The Federal Court enjoined the Attorney General from proceeding against the railroad. He appeared in the suit only for the purpose of moving to dismiss the

bill on the ground that the court had no jurisdiction over him as Attorney General. He averred that the state of Minnesota had not consented and did not consent to the suit, which was in fact a suit against the state of Minnesota, contrary to the 11th Amendment to the United States Constitution. His motion was denied and demurrer overruled. The case was heard on some preliminary motions, and after some evidence had been taken, Young was enjoined from proceeding against the company or its officers. He proceeded, however, in the teeth of this injunction, asking in the state court for a mandamus directing the railroad company to "adopt and publish and keep for public inspection" the rates to be made by them "for transportation of freight under the laws of Minnesota * * * rates and charges which do not exceed those declared to be just and reasonable in and by the term of those laws." For this proceeding he was ruled by the Federal Court, adjudged in contempt, fined and ordered to be held in custody until the fine was paid. He thereupon sued out a writ of habeas corpus in the Supreme Court of the United States, which upheld the Circuit Court and remanded him to custody.

The opinion of the court was delivered by Mr. Justice Peckham. A careful reading of it does not convince the reader that the opinion is equal to any one of the opinions heretofore made on great constitutional questions. Sifted down it looks very much as if the court held the acts of the State Legislature unconstitutional because of the enormous penalties denounced for their violation—penalties so large that in the language of the court the company preferred to obey the laws rather than run the risk of confiscation and severe penalties. The court, it is true, holds that a Federal question was raised in addition to this. The opinion cites at length and attempts to differentiate, the various cases which have been heretofore decided in the very teeth of the present decision. The opinion looks to us as if the court was dodging and trying to explain away its former decisions. Mr. Justice Peckham, in the hunting parlance, "Wherever he met a fence, took it with both eyes shut, one hand on the pommel and the other on the crupper." Virginia lawyers are thoroughly familiar with the case of In re Ayers, 123 U. S. 443—a case on all fours with the case at bar and which Mr. Justice Peckham attempts to explain away and to differentiate from the present case. His attempt

to do so is, as must be expected, an absolute and utter failure. The state of Minnesota, to use Justice Harlan's language, has had now "manacles put upon it to prevent it from being represented in its own court and from having the state court pass upon the validity of the state enactments." The curious thing about the whole decision is that the only question before the court was whether the suit of Perkins and Shepherd was not on its face as to the relief sought against the Attorney General, a suit against the state; for, as we have said, his only proceeding in the state court was for a mandamus requiring the adoption, publication and keeping of the freight rates. He had not asked for or attempted to enforce any penalties. Now, had the mandamus actually been issued and the case finally decided by the state court in favor of the state, what was to prevent the railroad from then taking the case to the Supreme Court of the United States? The railroad or its officials would have suffered no penalties of confiscation or imprisonment under this course.

In our judgment no case of greater moment has been decided for many years, and yet it seems to have aroused very little attention. Had it been rendered in 1859 the abuse heaped upon Judge Taney in the Dred Scott case would have seemed gentle language by the attacks it would have called forth. But we have grown accustomed to Federal usurpations of power. The Eleventh Amendment had as well be blotted out of the Constitution as long as the present decision remains law. The Sovereign States have now each of them an Emperor in the person of any subordinate Federal Judge.

A Courageous Judge.

We cannot forbear from quoting one paragraph in Justice Harlan's dissenting opinion in the above-mentioned case:

"I may frankly admit embarrassment arising from certain views stated in dissenting opinions heretofore delivered by me which did not at the time meet the approval of my brethern, and which I do not now myself entertain. What I shall say in this opinion will be in substantial accord with what the court has heretofore decided, while the opinion of the court departs, as I think, from principles previously announced by it upon full con-

sideration. I propose to adhere to former decisions of the court, whatever may have been once my opinion as to certain aspects of this general question."

The courage which impels a man frankly to admit a change of views upon great questions, which for a number of years he has entertained and which have been prominently before the nation, rises far above the ordinary and becomes wellnigh heroic—especially when those views have been long entertained, carefully studied and fearlessly expressed. But no great man ever hesitates to face the charge of inconsistency when he sees the right in a different aspect from which he once viewed it. Harlan has always claimed to be one of the staunchest advocates of States' Rights. His dissenting opinions in many constitutional cases have seemed to many of us to be rather curious methods of expressing his views in that direction. But there is no uncertain sound in his dissenting opinion in this case. It rings clear and true and sounds a note of warning to be carefully heeded. He has been, he is, a great judge; but no act of his whole judicial career reflects more honor upon him and will bring him a greater and more lasting fame than the vigorous, clear, wellnigh unanswerable statement of the effect of the decision of the court in this case. It is a state paper. No lover of our old constitutional form of government should fail to read it, to remember it, and to do all in his power to try and bring the courts back to it.

Sales of Merchandise in Bulk.

An interesting question has been raised as to the effect of § 2460a, Pollard's Code, upon a conveyance to a trustee for the benefit of creditors of a merchant's entire stock of goods in which certain of the creditors are preferred. The language of that section is in the main as follows:

"It shall be unlawful for any merchant engaged in the buying and selling of merchandise while he is indebted to any person, to sell his entire stock of merchandise, in bulk, or to sell the major portion thereof otherwise than in the ordinary course of trade, in the regular and usual prosecution of the seller's business, and with the intention of ceasing to conduct said business, in the same manner and at the same place as he has heretofore conducted the same, without first making a full

and complete inventory of the merchandise so proposed to be sold, in which inventory the values shall be extended at the ruling wholesale price thereof; and without further making a full, true, and correct schedule of all persons to whom he is indebted, stating therein the postoffice address of each of said creditors, and the amount owing to each of them; to which inventory and schedule there shall be attached the oath of the seller that the same is true and correct; or if the seller shall assert that he is not indebted to any person, he shall make affidavit to that effect and deliver the same to the purchaser, with the inventory, as hereinafter provided. * * * Ten days before such sale shall be consummated, and before the purchaser take possession of the merchandise so proposed to be sold, the seller and proposed purchaser shall join in giving written or printed notice of the proposed sale and purchase of such merchandise to each of the creditors named in such schedule; such notice may be delivered in person to such creditors, or transmitted to them by registered letter through the United States mails by being deposited in the United States postoffice at the place where the seller has heretofore conducted business, or nearest thereto, properly addressed to the respective creditors at the postoffice address given in such schedule, with proper postage affixed; such notice shall state the aggregate value of the merchandise proposed to be sold as shown by such inventory, the consideration to be paid therefor, and the time and manner of making such payment. If said seller shall fail to make such inventory of such merchandise, or if such inventory shall fail to state the true value of said goods as above required, or if said seller shall fail to make such true schedule of creditors as hereinafter provided, and the purchaser shall have knowledge of that fact, or in event the seller shall assert that there are no debts against him, if the purchaser shall fail to require the affidavit above provided, or if the seller and purchaser shall fail to give each of said creditors named in said schedule the notice above required in the manner above provided, or if such notice shall not correctly state the amount of such merchandise proposed to be sold, and the consideration to be paid therefor, and the time and manner of making the same, then and in either of such events such sale shall prima facie be presumed to

be fraudulent and void as against the creditors of such seller, and the merchandise in the hands of the purchaser, or any part thereof, if it shall be found in his hands, shall be liable to such creditors; and in event the same, or any part thereof, shall be withdrawn by said purchaser, then the purchaser himself personally shall also be liable to said creditors of such seller to the extent of the value of the merchandise so received by him and thus withdrawn."

Now a trustee in a deed of trust and the creditors secured therein are purchasers for value. Evans *v.* Greenhow, 15th Gratt. 153. Does a trustee render himself liable under § 2460a, if prior to the execution of the deed, the inventory and schedule are not prepared and the notice given? Would not be and the preferred creditors be liable to those creditors who, being unpreferred, should receive nothing under the deed after all the property is sold? Or is the trustee agent for both parties? Hudson *v.* Basham, 101 Va. 63. And therefore all the creditors secured in the deed of trust, regardless of any preferences are to be treated as themselves the purchasers. We express no opinion, but think the matter worthy of the earnest attention of the profession. We know of one young lawyer who declined to be a trustee in a deed preferring creditors, on account of this section, and whilst we were inclined to laugh at his caution at first blush, on second consideration we are not so well satisfied that his caution was not justified.

Payment of Poll Taxes in Special and Local Option Elections.

We were rash enough in the April number of THE LAW REGISTER to state that the Act of February 25th, 1908, had *settled* a long-vexed question as to when the poll tax had to be paid in special and local option elections. That an act of the Legislature could settle anything of the sort until it had run the gamut of the courts is very questionable and we spoke unadvisedly. A distinguished gentleman in the state has called our attention to § 18 of the Schedule of the Constitution and asked the question whether in our opinion the Act of February 25th is not unconstitutional. This section provides: "In *all* elections held after this Constitution goes into effect the qualifications of electors shall be those

required by article 2 of this Constitution;" and § 24 of the Schedule provides that the Constitution will go into effect "subject to the provisions of the Schedule annexed thereto." It might be claimed that § 18 of the Schedule applied only to the election of officers, but if that was the case, what was the necessity of inserting it when article 2 had made ample provision for such elections and electors and had covered the ground? Article 2 had fully prescribed the qualifications of electors in elections for officers and it seems to us that the only office of § 18 of the Schedule is to extend the same qualifications to *electors in all elections.* Now, can *all* elections as used in the Schedule be restricted?

This express question was before the Supreme Court of the state of South Carolina in the case of State *v.* State Board of Canvassers, 59 S. E. Rep. 145. Section 1, art. 2, of the South Carolina Constitution, provides that all elections by the people shall be by ballot, and the court held that the word "elections" included every expression of choice by voters of a body politic and therefore included local option elections.

Section 21, art. 2, of the Constitution of Virginia, expressly makes as a prerequisite to the right to vote after the 1st day of January, 1904, personal payment by the voter, at least six months prior to the election, of all state poll taxes assessed or assessable against him under this Constitution during the three years next preceding that in which he offers to vote. It seems to us, therefore, that the act of February 25th, 1908, is clearly unconstitutional. There can be no difference made by the Legislature as to who shall vote at a local option or special election. All elections must be held in accordance with the Constitution, which has limited the qualification to electors.